James B. Dowd v. U.S. General Accounting Office

Docket No. 91-03

Date of Decision: February 24, 1992

Cite as: Dowd v. GAO (2/24/92)

Before: Personnel Appeals Board, en banc (Roger P. Kaplan, Chair; Paul A. Weinstein, Vice Chair; Isabelle R. Cappello, Nancy A. McBride, Alan S. Rosenthal, Members)

Summary Judgment

Jurisdiction

Prohibited Personnel Practice

Authority of PAB

Affirmative Action

Statutory Construction

Effect of GAO Regulations

Authority of PAB General Counsel

Stays of Personnel Actions

DECISION EN BANC ON MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

On March 25, 1991, the Personnel Appeals Board received a Petition for Review (denominated as a Complaint) from Petitioner, in which he alleges that he and other similarly situated disabled veterans of the Vietnam era have been denied mandated veterans' preference right by the United States General Accounting Office (GAO or Respondent) in that GAO "has never established affirmative action plans for Veterans" or given them"any preferences in the promotion or advancement processes." It is alleged that these violations are "continuing in nature" and that Petitioner "first became aware of" them when promotion panels in July 1988 and 1989 failed to promote him.[1] The Petition alleges that the rights sought are those accruing to Petitioner and others like him under certain statutes and regulations. The statutes and regulations are named in an attachment to the Petition.[2] The named statutes include the GAO Personnel Act of 1980 (GAOPA), Public Law 96-191, 94 Stat. 27, 31 U.S.C. § 52 enacted on February 15, 1980, and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VRAA), Public Law 93-508, § 403(a), 88 Stat. 1594, 38 U.S.C. § 2014(c), enacted on December 3, 1974. Section 2014(c) of the VRAA supplements the mandated affirmative action provision of the Rehabilitation Act of 1973 (Rehabilitation Act), Public Law 93-112, Title V, 87 Stat. 501(b), 29 U.S.C. § 791(b), enacted on September 26, 1973. The named regulations include Chapter 10 of GAO Order 2306.1 (October 1, 1980). The VRAA and Chapter 10 of GAO Order 2306.1 both require the annual formulation and implementation of affirmative action plans for disabled veterans. (The Rehabilitation Act and GAO Order 2306.1 also require such plans for handicapped individuals.)

The relief sought by Petitioner includes a preliminary injunction against or stay of any further promotions or hirings until these plans are in place and functioning in accordance with law; the establishment of mandated affirmative action plans; retroactive promotions or money equivalents; backpay; damages; costs; and attorneys' fee.

On April 22, 1991, Respondent filed an answer denying all of the alleged violations and, on May 22, 1991, filed a motion for summary judgment on the grounds that: there is no legal requirement that GAO grant a preference in promotions to Vietnam-era veterans or to disabled veterans or that it institute affirmative action plans for them; this Board lacks subject-matter jurisdiction to hear Petitioner's allegations; the allegations are untimely; and the Board lacks jurisdiction to grant preliminary injunctive relief in the absence of a request from its General Counsel.

On July 8, 1991, the General Counsel of this Board, having first obtained permission to do so, filed an amicus curiae brief in support of the position that Respondent is required to establish affirmative action plans for the handicapped and for disabled veterans under the GAOPA, the VRAA and the Rehabilitation Act.

On July 12, 1991, Petitioner filed an opposition to Respondent's motion and a cross-motion for partial summary judgment (cross-motion). In his cross-motion, Petitioner adopted the brief of the Board's General Counsel. The Petitioner' cross-motion is limited to the question of liability under applicable statutes and regulations. For himself and the class that he seeks to represent, Petitioner requests partial summary judgment establishing "the GAO's failure to implement statutorily mandated affirmative action programs affecting hiring, promotions and similar or related preferences in employment, promotion and hiring mandated by Federal law and regulations."[3] Petitioner requests an order

> ruling that the United States General Accounting Office is subject to all the statutory rules and regulations pertaining to preference in hiring and promotion for Vietnam-era veterans, handicapped veterans and handicapped persons and that following a determination of liability for failure to follow any of the applicable statutory provisions a period of discovery be set by this Honorable Board for inquiry into the definition, composition and membership of the class, the extent and magnitude of damages to the class, and other related matters.[4]

On September 3, 1991, Respondent filed its opposition to Petitioner's cross-motion.

On October 7, 1991, having first obtained permission, the General Counsel of this Board filed a second amicus curiae brief. Thereafter, on November 1, 1991, the Board heard oral argument by the parties and the amicus curiae on the issues raised by the motions for summary judgment. During the pendency of these dispositive motions, discovery and several motions related to discovery have been held in abeyance.

Issues

1. Whether the Board has subject-matter jurisdiction over the allegations.

2. Whether the allegations are timely.

3. Whether any statute, rule, or regulation requires Respondent to implement a preference for Petitioner and the class he seeks to represent with respect to promotions and/or advancement.

4. Whether any statute require Respondents to implement an affirmative action plan for Petitioner and the class he seeks to represent.

5. Whether any rule or regulation requires Respondent to implement an affirmative action plan for Petitioner and the class he seeks to represent.

6. Whether Petitioner may, himself, seek a stay or preliminary injunction for this Board.

Uncontroverted Facts

1. Petitioner is a 30 percent service-connected, disabled veteran of the Vietnam era.

2. Petitioner was competitively employed by Respondent in October 1979 and is presently a Band I evaluator in the National Security and International Affairs Division. He holds the equivalent of a GS-12 grade.

3. Petitioner was considered for promotion in 1988 and 1989 to a Band II position.

4. In determining the appropriateness of a promotion for Petitioner in 1988 and 1989, Respondent did not apply any preference to Petitioner's score as a result of the fact that he is a Vietnam-era veteran or the fact that he is a disabled veteran.

5. Respondent recognizes a veterans' preference in competitive examinations, in appointments to positions, and in retention during reduction-in-force periods.

6. Respondent does not recognize a veterans' preference in promotions or advancement.

7. Respondent does not have an affirmative action plan specifically applicable to Vietnam-era or disabled veterans.

8. During the 1988 and 1989 promotion periods and at the time the Petition for Review was filed, Respondent did not have an affirmative action plan for Vietnam-era or disabled veterans or for handicapped individuals.[5]

Conclusion

Although we are confronted with what are denominated as motions for summary judgment, in actuality the Respondent's motion seeks a dismissal of the Petition for Review on the alternate grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. This is because, for its purposes, the motion accepts as true all of the material allegations of fact contained in the Petition. As is well established, the gravamen of a motion to dismiss -- whether grounded upon an asserted lack of jurisdiction or otherwise -- is that, on its face, a petition (or complaint) is legally insufficient to provide a basis for any relief.[6]

In contrast, a motion for summary judgment, by its very nature, goes beyond the four corners of a petition or complaint. At the root of such a motion in the context of our practice is the claim (often supported by affidavits) that the allegations of the petition present no genuine issue of material fact and that the movant (whether a petitioner or a respondent) is entitled to judgment on the merits as a matter of law.[7] The cross-motion of Petitioner now before us comes within that framework. It maintains in essence that, given

the facts alleged in the Petition that have not been disputed in the Respondent's response (and as to which there accordingly is no genuine issue), the Petitioner is legally entitled to a partial judgment in his favor.

For these reasons, we shall treat the Respondent's motion as a motion to dismiss the Petition for Review. Because we determine both that the Board has subject-matter jurisdiction and that the Petition states a claim upon which relief can be granted, Respondent's motion is denied. With respect to Petitioner's cross-motion for partial summary judgment, we grant that relief albeit not on the precise ground assigned by Petitioner.

I. This Board has subject-matter jurisdiction over Petitioner's claim, which is timely.

A. This Board has subject matter jurisdiction over the claims being made. Petitioner alleges that an affirmative action plan would have leveled the playing field for him and others like him, in competing for promotions. Congress has given this Board jurisdiction to hear claims that GAO employees are entitled to equal opportunity in such matters, as hereinafter outlined.

On basis for the Board's jurisdiction is found in the GAOPA at 31 U.S.C. § 753(a)(2): "The Board may consider and order corrective or disciplinary action in cases arising from ... (2) a prohibited personnel practice under section 732(b)(2) of this title." As a GAO employee, Petitioner has standing to bring before this Board an action based upon an alleged prohibited personnel practice.[8]

Section 732(b)(2) of the GAOPA provides that GAO's personnel system shall "prohibit the personnel practices prohibited under section 2302(b) of such title [title 5 United States Code]... ."

As provided by 5 U.S.C. § 2302(b): "Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not with respect to such authority ... (11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2302(a)(2)(ii) and (ix) of title 5 define a "personnel action" as meaning, among other things, a "promotion" and a decision concerning "education or training if the education or training may reasonably be expected to lead to [a]...promotion [or] performance evaluation... ."

One of the "merit system principles" found in section 2301 of title 5 is in subpart (b)(1) requiring that "advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all received equal opportunity." (Emphasis added.) GAO has recognized this merit principle in its regulations implementing the GAOPA. See 4 C.F.R. 2.4(b) stating that "[e]qual employment opportunity is an integral part of every merit system" and that "[a]ffirmative actions plans ... must assure that both in operation and results the merit system reflects equal opportunity at every step of the personnel process."

Assurance of "equal opportunity" is just what is addressed by the affirmative action plans required by GAO Order 2306.1. Through these plans, disabled veterans and handicapped individuals are helped to compete on level playing field with the nondisabled and the nonhandicapped. As several courts have stated in regard to the affirmative action plans required by section 501 of the Rehabilitation Act of 1974, these plans "ensure that handicapped individuals are afforded equal opportunity in both job assignments and promotions." See Hall v. U.S. Postal Service, 857 F.2d 1073, 1077 (6th Cir. 1988); Previtt v. United States Postal Service, 662 F.2d 292, 306 (5th Cir. Unit A, 1981); and Ryan v. FDIC, 565 F.2d 762, 763 (D.C. Cir. 1977).

Respondent argues that this Board lacks subject matter jurisdiction on the ground that "to establish a prohibited personnel practice in this case, petitioner must establish that GAO's actions violate a law, rule, or regulation."[9] We have concluded, as discussed below, that GAO's actions in failing to follow its own Order 2306.1 have placed it in violation of a binding rule or regulation.

B. The Petition for Review was timely filed in that it alleges that "violations are continuing in nature."[10] Employees may bring such violations before the Board "at any time."[11]

This is an issue which became moot when, at the oral argument, counsel for Respondent conceded that failure to have a mandated affirmative action plan could be deemed a continuing violation.[12] As of the date the Petition was filed, Respondent did not have, and had not had for a number of years, an affirmative action plan as mandated by its Order 2306.1, as discussed below.

II. There is no legal requirement that Petitioner receive a "preference" with respect to promotions.

This issue became moot upon the concession made at the oral argument by counsel for Petitioner that Petitioner is not "entitled to a promotion" under the law.[13] Rather, as articulated at the oral argument, it is Petitioner's position that had he received certain additional education and training opportunities, under an affirmative action plan, he might have received promotions and that the issue as to promotions "is the magnitude of the equitable relief involved."[14] As counsel for Petitioner stated, this will be "a very difficult question," and it is "premature at this point for [Petitioner] to go into how [he is] going to prove the magnitude of the back pay award or whatever for Mr. Dowd and the class. It's a matter of discovery. It just can't be done today."[15]

III. Although there is no statutory requirement that Respondent provide an affirmative action program plan for disabled veterans, it is bound by GAO Order 2306.1 to provide such a program.

Petitioner's argument regarding the existence of an affirmative action requirement is premised on the applicability of two statutes to GAO employees--the VRAA and the Rehabilitation Act of 1973. His position may be summarized briefly as follows: The VRAA requires GAO to have an affirmative action program for disabled veterans as part of an affirmative action program it is required to have under the Rehabilitation Act of 1973. Respondent contends that neither statute applies and that it is, therefore, not statutorily required to have an affirmative action program for disabled veterans. For reasons more fully set forth below, the Board agrees with Respondent's position. Nevertheless, because we also conclude that Respondent's Order 2306.1 requires affirmative action for disabled veterans, the Respondent's motion is denied insofar as it requests that the Board "enter judgment for GAO as a matter of law."[16]

A. The VRAA does not apply to GAO.

Petitioner advances two arguments regarding coverage of GAO under the two statutes. The first argument requires construction of the statutes themselves (the VRAA and the Rehabilitation Act of 1973) as including GAO within their coverage. The second argument is based on a theory that the statutes in question were incorporated into the GAOPA when that statute was enacted in 1980. We have considered both arguments with respect to coverage under the VRAA and conclude that the VRAA's affirmative action requirement does not apply to GAO. This being the case, there is no need for us to determine coverage under the Rehabilitation Act of 1973, because Petitioner does not assert any separate claim under that statute. His complaints are all related to his status as a disabled veteran.[17]

Petitioner has asserted entitlement to the benefit of an affirmative action program for disabled veterans as required by 38 U.S.C. § 2014(c). This section is part of Chapter 42 Title 38 of the U.S. Code. Chapter 42 covers "Employment and Training of Disabled and Vietnam Era Veterans." Chapter 42 consists of four sections: Section 2011 establishes definitions for the chapter; section 2012 provides for veterans' employment emphasis under Federal contracts; section 2013 establishes eligibility requirements for veterans under Federal employment; and section 2014 addresses employment within the Federal government, including an affirmative action requirement at subsection (c), which Petitioner and the PAB General Counsel contend is applicable here.

Section 2014(c) provides in pertinent part:

> Each agency shall include in its affirmative action plan for the hiring, placement, and advancement of handicapped individuals in such agency as required by section 501(b) of the Rehabilitation Act of 1973 (29 U.S.C. 791(b)) a separate specification of plans... to promote and carry out such affirmative action with respect to disabled veterans....

As used in Chapter 42, the term "department or agency" includes "any Executive agency as defined in section 105 of title 5." 38 U.S.C. § 2011(5). This definition set for at section 2011(5) does include GAO. Section 105 provides that, for purposes of Title 5, "'Executive agency' means an Executive department, a Government corporation, and an independent establishment." Independent establishment is defined at section 104(2) to include the General Accounting Office.

This definition would carry over to section 2014 had Congress not expressly made coverage under that section different. As enacted in 1974, the requirement for affirmative action was as follows:

> (c) Each department, agency and instrumentality in the executive branch shall include in its affirmative action plan for the hiring, advancement and placement of handicapped individuals in such department, agency or instrumentality as required by section 501(b) of Public Law 93-112 (87 Sat. 391), a separate specification of plans (...) to promote and carry out such affirmative action with respect to disabled veterans....[Emphasis added.] [18]

Thus, this section was always applicable only to departments, agencies and instrumentalities in the executive branch. A 1984 amendment solidified this interpretation by adding to section 2014 a definition section designated subparagraph (a)(2) which provides that, for purposes of section 2014 only, the term agency means"a department, agency or instrumentality in the executive branch." [19]

We simply cannot read coverage under 2014(c) to include GAO. GAO is plainly an agency in the legislative branch, not the executive branch. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986). Notwithstanding this, Congress has, for limited and specific purposes included GAO in the definition of "Executive agency." (See 5 U.S.C. § 105; 38 U.S.C. § 2011(a)(2)). The cited provisions refer generally to personnel matters. Because Congress has shown that it knows how to include GAO in the definition of executive agency when it so chooses, we cannot presume an intent to do so where it has not clearly done so. This is especially so in Chapter 42 of Title 38, in which an otherwise inclusive definition set forth in § 2011(5), is clearly modified for purposes of § 2014 by the definition set forth at §2014(a)(2). [20]

The other argument advanced in support of coverage of GAO under the VRAA is that GAO is covered because the VRAA was incorporated into the GAOPA. This argument has no merit. The GAO PA was enacted in 1980 with the primary purpose of removing GAO employees from the executive branch

personnel system to avoid possible conflicts of interest between GAO and agencies under its audit and investigation purview. In so doing, Congress intended to preserve for GAO employees the substantive rights enjoyed by other Federal employees.

The amicus curiae asserts that Congress intended to incorporate into the GAOPA "all of the rights and protections of the various anti-discrimination statutes into the GAO personnel system, including the rights and protections of the Rehabilitation Act and the VRAA.[21]

The language of the statute does not support this view. As originally enacted on February 8, 1980, the GAOPA stated that:

> [n]othing in this Act shall be construed to abolish or diminish any right or remedy granted to employees of or applicants for employment in the General Accounting Office by section 717 of the Civil Rights Act of 1974 (42 U.S.C. 2000e-16), by sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), by section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), by sections 501 and 505 of the Rehabilitation Act of 1973 (27 U.S.C. 791, 794(a)), or by any other law prohibiting discrimination in Federal employment on the basis of race, color, religion, age, sex, national origin, political affiliation, marital status or handicapping condition.

Public Law 96-191, 94 Stat. 28, § 3(g)(3), codified at 31 U.S.C. § 732(f)(2) (emphasis added). On its face, this language does no more than preserve such rights as GAO employees enjoyed prior to enactment of the GAOPA. In assuring that the GAOPA did not "abolish or diminish any right or remedy" granted by the referenced statutes, Congress did not evidence an intent to expand such rights.

For the foregoing reasons, we conclude that 38 U.S.C. § 2014(c) does not apply to GAO. The plain language of the VRAA reveals that GAO, a legislative branch agency, is not covered by the requirements of section 2014, including the subsection (c) provision regarding affirmative action for disabled veterans, and there is no basis for concluding that the VRAA was incorporated into the GAOPA.

B. Our determination that the agency is under no statutory obligation to provide an affirmative action program does not, however, end the matter. In passing upon the agency's motion to dismiss, we cannot confine ourselves to an examination of the particular legal theory advanced by Petitioner. Rather, our obligation extends to ascertaining whether, on the facts Petitioner alleges, there is any possible legal basis for granting the relief sought. See Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974), and other authorities cited in Bowers v. Hardwick, 478 U.S. 186, 201-02 (1986) (Blackmun, J., dissenting). In discharging that duty, we must come to grips with the consideration that, for over a decade and until earlier this year, the GAO had in place a regulation by which the agency unmistakably committed itself to establish such a program. This regulation is to be found in Chapter 10 of GAO Order 2306.1 (October 1, 1980).[22]

Chapter 10, entitled "AFFIRMATIVE ACTION PROGRAM PLANS," commences (subsection 1a.) with a statement of the agency's adherence "to a policy that will provide equal employment opportunities for handicapped individuals and disabled veterans in Federal jobs."[23] In subsection 1b., the Chapter announces that the agency "will set objectives for the administration and management of the affirmative action program" necessary to give effect to that policy. The subsection goes on to supply assurance that, "[a]s a minimum," the objectives "will address" such matters as "[a]chieving full management commitment to program goals;" "committing adequate resources to support program effort;" "[d]elegating appropriate authority to direct and accomplish program efforts;" and, with particular reference to disabled

veterans, "[e]nsuring that [they] receive equal opportunities in hiring, placement, and retention." With regard to the assignment of responsibility for the setting of "GAO-wide objectives," for the development of "affirmative action plans for management of the program" and for the fulfillment of guidance and evaluation functions, subsection 1c. puts that broad undertaking at the doorstep of the Comptroller General who "will" carry out the various functions "based upon input from the various divisions and offices."

Section 2 of Chapter 10 describes the obligatory five major components of the annual affirmative action program plans. For the most part, these components focus upon the achievement of the program goal through the realization of the specific objectives. The last prescribed component is a statistical report of disabled veterans.

Although, as earlier determined, the promulgation of Chapter 10 was not required in response to a legislative directive, we encounter little difficulty in concluding that the agency nonetheless was obligated to carry out its clearly mandatory provisions. Indeed, to reach this result, we need not go beyond the long-settled principles enunciated by the Supreme Court in such cases as Service v. Dulles, 354 U.S. 363 (1957), and Vitarelli v. Seaton, 357 U.S. 535 (1959).

Service involved the challenge by a Foreign Service officer to his discharge by the Secretary of State. The discharge had rested on a finding of the Loyalty Review Board of the Civil Service Commission that there was reasonable doubt as to the employee's loyalty and that Board's advice to the Secretary that he "should be forthwith removed from the rolls of the Department of State." In effecting the removal, the Secretary had pointed to the broad authority conferred upon him by both statute and an Executive Order. For its part, the statutory provision in question, known as the "McCarran Rider," empowered the Secretary, "in his absolute discretion," to terminate the employment of any employee of the Foreign Service "whenever [the Secretary] shall deem such termination necessary or advisable in the interests of the United States."[24]

Notwithstanding the virtual carte blanche placed in the hands of the Secretary by the Congress, a unanimous Supreme Court overturned the discharge. It did so on the ground that the Secretary had violated Department of State regulations under which a precondition to the dismissal of an employee for loyalty or security reasons was a recommendation by a subordinate Department official that such action be taken upon the basis of findings of the Department's Loyalty Security Board. Far from that condition being satisfied, the Loyalty Security Board had repeatedly cleared Service of charges of being disloyal and a security risk and its findings had been approved by the responsible official. The Court's conclusion was succinctly stated:

> While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having do so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

Id. at 388.

The Service holding served as the foundation of the Supreme Court's disposition of Vitarelli two years later. At issue in that case was the 1954 discharge on security grounds of an employee of the Department of the Interior. At the time of his discharge, the employee concededly did not enjoy the protection of any statute relating to employment rights of government employees and consequently was subject to summary removal at any time by the Secretary of the Interior without the giving of a reason.[25] As in Service, however, the discharge was not accomplished in conformity with regulations that the Secretary had

promulgated for application in circumstances where national security was being assigned as the reason for the adverse administrative action. This being so, the Court held, citing Service, that the discharge could not stand. Although the Secretary had the statutory authority to remove the employee summarily without explanation, once he had gratuitously decided to give a reason and that reason was national security, he was obligated to conform to the procedural standard he had formulated in [his regulations] for the dismissal of employees on security grounds.[26]

On behalf of four justices, Justice Frankfurter filed a separate opinion, concurring in part and dissenting in part. Although disagreeing with the majority's result because of certain subsequent administrative action taken against Vitarelli in 1956, Justice Frankfurter made clear his endorsement of the "Court's main conclusion, that the attempted dismissal of Vitarelli in September 1954 was abortive and of no validity because the procedure under the Department of Interior [regulations] was invoked but not observed."[27] For, "[a]n executive agency must be rigorously held to the standards by which it professes its action to be judged."[28]

First, both Service and Vitarelli have been cited in contexts other than a challenge to the dismissal of a Federal employee. See e.g., United States v. Caceres, 440 U.S. 741, 751 n.14 (1979); Montilla v. I.N.S., 926 F.2d 162, 167 (2d Cir. 1991); Padula v. Webster, 822 F.2d 97, 100 (D.C. Cir. 1987). Second, there is no readily apparent reason why the GAO should now be permitted to repudiate a commitment it made in unconditional terms to, inter alia, this Petitioner and other disabled veterans in its employ. To the contrary, as applied to the situation at hand, the teachings of Service and Vitarelli make eminent good sense.

The matter comes down to this: The Comptroller General was not required by statute to provide an affirmative action program for the benefit of Petitioner and those similarly situated. But once he elected to do so, and then chose to give effect to that election in mandatory terms in Chapter 10 of Order 2306.1, why should not the die have become cast?

As long as Chapter 10 remained undisturbed, affected employees such as Petitioner assuredly had just as much right to rely upon its as Messrs. Service and Vitarelli had the right to expect the observance of the procedural and substantive regulations bearing upon their employment tenure that had been gratuitously promulgated by their agency heads. Indeed, any contrary conclusion perforce would disserve the agency and not solely Petitioner and other GAO employees. It scarcely requires much imagination to envisage the impact upon employee morale -- and thus upon the efficiency of the public service -- were an agency head to be accorded free license to disregard iron-clad undertakings for the benefit of his or her employees, incorporated in a regulation, simply because the undertakings had been voluntarily assumed rather than required by statute.[29]

It has recently come to our attention that, as a result of the passage of the Americans with Disabilities Act of 1990, Respondent on January 17, 1992, promulgated an "extensively revised" Order 2306.1 which "supersedes" the October 1980 version of the Order.[30] There is no present need, however, to compare the terms of the new Order with those of Chapter 10 of the prior version. This is so because it is obvious that Respondent's decision to replace Chapter 10 cannot be given retroactive effect or serve to defeat Petitioner's receipt of any relief to which he might be entitled by virtue of the Respondent's failure to implement provisions of that Chapter while it remained unaltered. Petitioner must now be accorded the opportunity to demonstrate any cognizable injury that might have been sustained by him because of the agency's asserted failure to carry out Chapter 10 as it stood between 1980 and 1992.

IV. Under the Board's rules, only its General Counsel is authorized to seek a stay or a preliminary injunction.

Petitioner seeks a stay or preliminary injunction against any further promotions or hirings until mandated affirmative action plans are in place and functioning. These are extraordinary remedies. This Board has vested only its General Counsel with the authority to seek them.[31] Thus far, the General Counsel has not deemed it appropriate to do so.

ORDER

Base upon the above premises, it is hereby ORDERED that:

1. Respondent's motion is DENIED.

2. Petitioner's cross-motion is GRANTED.

3. Relief sought in the Petition for Review for a stay or temporary injunction and under any statutes requiring affirmative action plans or preference in promotions is STRICKEN.

4. This case is to be immediately transferred to the Board's hearing docket, and assigned to an administrative judge for further proceedings.

5. The stay on discovery is lifted and the parties should proceed in accordance with 4 C.F.R. § 28.40-45. The time period set forth in 4 C.F.R. § 28.42(d)(1) shall begin to run when so ordered by the presiding judge.

SO ORDERED.

Notes

1. See Petition for Review at 3, 4 and 5.

2. The attachment is the Report and Recommendations for the General Counsel of the Personnel Appeals Board, who investigated Petitioner's complaint and advised him of the results of his investigation pursuant to his responsibilities under 4 C.F.R. § 28.12.

3. See cross-motion at 1.

4. See cross-motion at 3.

5. See this Board's 1990 EEO Oversight Study of GAO's Employment of Persons with Disabilities, pages 30-31 and 112, of which this Board takes judicial notice.

6. See e.g., Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

7. See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

8. See 4 C.F.R. §§ 28.2(b)(2) and 28.3.

9. See Respondent's Motion for Summary Judgment at 16.

10. See Petition for Review at 5.

11. See 4 C.F.R. § 28.11(b)(5).

12. See the transcript of the oral argument at page 35.

13. See Tr. at 29.

14. See Tr. at 30.

15. See Tr. at page 32.

16. See Respondent's Motion for Summary Judgment at 18.

17. We note that page 1 of Petitioner's cross-motion for summary judgment states that it is made on behalf of GAO employees, former employees, and applicants, who are Vietnam-era veterans, handicapped veterans, and/or handicapped persons. The prayer for relief request "an order ruling that the United States General Accounting Office is subject to all of the statutory rules and regulations pertaining to preferences in hiring and promotion for Vietnam era veterans, handicapped veterans and handicapped persons...." These references to "handicapped persons" do not change the fact that the Petition is framed exclusively in terms of Federal statutes which mandate the establishment of affirmative action for disabled veterans. See Petition for Review at 2 & 6.
Petitioner has alleged that he is a 30 percent disabled Vietnam-era veteran and the Respondent has admitted this at page 2, paragraph 4 of its answer. Petitioner has never alleged that he is a handicapped person within the meaning of the Rehabilitation Act of 1973 or any other law, rule or regulations governing employment rights of handicapped persons.

18. See Pub. L. 93-508, December 3, 1974.

19. See Pub. L. 98-543, § 211(a)(2), October 24, 1984.

20. Although we do not reach the issue of coverage under the Rehabilitation Act of 1973, we note in passing that the coverage language used in the statute mirrors that used in § 2014; coverage extends to "each department, agency and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch." 29 U.S.C. § 791(b).

21. Brief for Amicus Curiae at 4.

22. There is no room for serious doubt that the mandatory provisions of GAO orders such as 2306.1 have the force and effect of regulations. See, e.g., Hendley v. GAO, Docket No. 120-211-02-89 (decided November 19, 1990); Outerbridge v. GAO, Docket No. 30-202-17-83 (decided September 30, 1984). Indeed, formal orders, of which 2306.1 is illustrative, provide the principal (whether or not exclusive) means by which the agency establishes the framework for the fulfillment of its regulatory responsibilities in the personnel area.
Although Chapter 10 was recently superseded, that action has no effect upon the viability of the Chapter

for the purpose of this proceeding. See page 24, below. Thus, we shall henceforth refer to the Chapter and its provisions in the present tense.

23. All emphasis in this paragraph is supplied. Because the Petition invokes only Petitioner's status as a disabled veteran, we will refer solely to the provisions of Chapter 10 that relate to persons claiming that status.

24. See 354 U.S. at 370.

25. See 359 U.S. at 539.

26. Id.

27. See 359 U.S. at 547.

28. See 339 U.S. at 546 (citing Securities & Exchange Comm'n. v. Chenery Corp., 318 U.S. 80, 87-88 (1943).

29. In Vietnam Veterans v. Secretary of the Navy, 843 F.2d 528, 536-37 (D.C. Cir. 1988), the court took note of what it deemed to be a split in dicta in prior cases on the question whether the "established maxim requiring agencies to adhere to their own rules" (illustrated by Service and Vitarelli) extends to mere general policy statements or interpretative rules. We need not pause here to consider the court's treatment of the split. For Chapter 10 of Order 2306.1 manifestly is neither simply a statement of policy nor an interpretative rule. To the contrary, as seen, in terms that are mandatory and not precatory, Chapter 10 imposes substantive obligations upon the agency and, as such, indisputably is a regulation within the scope of the Service/Vitarelli doctrine.

30. See paragraph 2.

31. See 4 C.F.R. § 28.133.